IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

I.T.A. No.353 of 2006
Date of decision: 13.11.2006

Commissioner of Income Tax, Karnal.

---Appellant

Vs.

M/s Five Star Rugs, Panipat.

---Respondent.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE RAJESH BINDAL

Present: Mr. Yogesh Putney, Advocate
for the revenue.

None for the assessee, despite service.

ORDER:

This appeal has been preferred by the revenue against the order dated 30.11.2005 of Income Tax Appellate Tribunal, New Delhi Bench 'SMC' in I.T.A. No.5707/DEL/2004 in respect of the assessment year 2001-02 proposing following substantial question of law:-

> "1. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was right in law in sustaining the order of the CIT (Appeals) directing the AO to allow deduction u/s 80IB on the amount of duty draw back received by the assessee which cannot be termed as income "derived from" an industrial undertaking as held by the Hon'ble Supreme Court of India in the case of CIT Vs. Sterling Foods (1999) 237 ITR 579 (SC) followed by the Hon'ble Madras High Court in the cases of CIT Vs. Jameel Leathers & Uppers (2000) 246 ITR 97 (Mad) and CIT Vs. Vishwanathan & Co. (2003) 261 ITR 737 (Mad) and the Hon'ble Delhi High Court in the case of CIT Vs. Ritesh Industries Ltd. 274 ITR 324 and also by the Hon'ble ITAT SMC Bench in the case of ACIT Vs. M/s Liberty India Panipat for the asstt. year 2001-02 vide order dated 28.6.2005?"

In spite of service, none appears for the assessee.

We have heard learned counsel for the revenue.

Learned counsel for the revenue relies upon the judgment of this Court dated 22.09.2006 in ***M/s Liberty India v. Commissioner of Income***

Tax, Karnal, I.T.A. No.590 of 2005, wherein, the question raised was examined and it was held that the amount of duty draw back received by the assessee could not be treated as income "derived from" an industrial undertaking. Relevant observations in **Liberty India's case** (*supra*) are as under:-

> "Section 80 IB(1) is as under:-
>
> > "(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11) and (11A) (such business being hereinafter referred to as the eligible business), there shall, in accordance with the subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section."

Interpreting the identical language in Section 80 HH, the Hon'ble Supreme Court in **Sterling Foods** *(Supra)* observed:-

> "We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in the circumstances only be said to be the Export Promotion Scheme of the Central Government whereunder the export entitlements become available. There must be, for the application of the words "derived from", a direct nexus between the profits and gains and the industrial undertaking. In the instant case, the nexus is not direct but only incidental. The industrial undertaking exports processed sea food. By reason of such export, the Export Promotion Scheme applies. Thereunder, the assessee is entitled to import entitlements, which it can sell. The sale consideration therefrom cannot, in our view, be held to constitute a profit and gain derived from the assessee's industrial undertaking.

We are of the view that for the reasoning adopted by the Hon'ble Supreme Court, income of the assessee from duty draw back cannot be held to be income "derived from" specified business.

Distinction sought to be made by the learned counsel for the assessee, in income derived from duty draw back and sale or import entitlement cannot be accepted as relevant distinction, as the core question before the Court was that such income was "derived" from specified business, which reasoning is fully applicable to the present situation.

For the above reasons, we are of the view that the matter being covered by the judgment of Hon'ble Supreme Court in

Sterling Foods (*supra),* no substantial question of law arises in the appeal."

We find merit in the contentions raised. For the reasons recorded in **Liberty India's case** (*supra*), the question raised is answered in favour of the revenue and against the assessee.

Accordingly, the appeal is allowed and the order of the Tribunal is set aside.

Before parting with the order, we are constrained to deprecate the manner in which the issue has been dealt with by the Tribunal which is against the settled norms of judicial discipline and propriety. The departmental representative had cited various judgments of Hon'ble the Supreme Court and different High Courts on the issue, such as ***CIT*** vs. ***Sterling Foods Ltd***. 237 ITR 579 (SC), ***CIT*** vs. ***Vishwanathan & Co.*** 261 ITR 733 (Mad.), ***CIT*** vs. ***Jameel Leathers & Uppers***, 246 ITR 97 (Mad.) and ***CIT*** vs. ***Ritesh Industries Ltd***. (2004) 192 CTR 81 (Del). but still, the Tribunal chose to follow the earlier orders passed by it without even adverting to these judgments and pointing out any point of distinction therein vis-à-vis the facts of the present case. Still further, the Tribunal in its wisdom has chosen to ignore the order passed by it earlier in the case of ***Liberty India*** (*supra)* upheld by this Court vide order dated 22.09.2006 on the basis of the judgment of Delhi High Court in ***Ritesh Industries'*** case *(supra)*, merely for the reason that there is no judgment of this Court on this issue. It lost sight of the fact that the earlier order of the Tribunal was pertaining to the area within the jurisdiction of this Court. As against this, the Tribunal has chosen to follow the orders passed by it in other cases. The reason given by the Tribunal for ignoring the earlier order passed by it in the case of ***Liberty India*** (*supra)* is not at all convincing. An order passed, following a judgment of the High Court, should not have been ignored in the manner it has been done. Such a practice has already been

deprecated by this Court in its judgment in ***Commissioner of Income Tax-I, Ludhiana v. M/s Abhishek Industries Limited, Ludhiana*** (2006) 286 ITR 1.

We are hopeful that the Tribunal, which is the highest statutory appellate authority under the Act will keep these principles in view while deciding lis between the parties so as to curb avoidable litigation.

(RAJESH BINDAL)
JUDGE

November 13, 2006 **(ADARSH KUMAR GOEL)**
ashwani **JUDGE**